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In The

Supreme Court of the United States

October Term, 1996

JOSEPH ONCALE,

Petitioner,

versus

SUNDOWNER OFFSHORE SERVICES, INCORPORATED; JOHN LYONS; DANNY PIPPEN; AND BRANDON JOHNSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether same sex (Male on Male) sexual harassment claims are actionable under the Civil Rights Act, Section 703(a) of Title VII and 42 U.S.C. § 2000(e)-2(a)(1)?

2. Whether the Fifth Circuit has erred as a matter of law in holding that same-sex harassment claims are not cognizable under Title VII?

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PETITION FOR WRIT OF CERTIORARI

Joseph Oncale respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding May 20, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 83 F.3d 118 and is reproduced at Appendix A. The order of the United States Court of Appeals for the Fifth Circuit denying the suggestion for rehearing *en banc* is not reported and is reproduced at Appendix B. The Judgment of the United States District Court for Eastern District of Louisiana is reproduced at Appendix C. The opinion of the United States District Court for the Eastern District of Louisiana is reported at 67 Fair Emply. Prac. Cas. (BNA) 769 and is reproduced at Appendix D.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1996. Joseph Oncale's petition for rehearing and suggesting for rehearing *en banc* was denied on July 12, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. Section 2000e-2 provides, in pertinent part:

(a) Employer Practices. It shall be an unlawful employment practice for an employer –

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

A. Procedural History

Through complaint for damages filed in the United States District Court, Eastern District of Louisiana, on May 5, 1994, Joseph L. Oncale advances a "same sex" sexual discrimination action against Sundowner Offshore Services, Inc., Oncale's payroll employer at the time of the alleged harassment, and three male co-workers, John Lyons, Danny Pippen and Brandon Johnson. Joseph Oncale alleges violations of Title VII of the Civil Rights Act, 42 U.S.C. Section 2000e-2(a)(1), and seeks remedies and relief as provided for under law. In response, the defendants filed a general denial and, ultimately, a summary judgment motion, challenging Joseph Oncale's right to advance a "male on male" sexual harassment claim under Title VII. The Employer's summary judgment motion was heard in the District Court on March 8, 1995.

Through Judgment entered March 24, 1995, the Honorable G. Thomas Porteous, Jr., United States District

Judge, granted summary judgment in favor of the defendants. Reasoning the Fifth Circuit, through *Garcia v. Elf Atochem North America*, 28 F.2d 446 (5th Cir. 1994), had "clearly articulated its position that same sex harassment does not state a claim under Title VII," the District Court found that Mr. Oncale, a male, could not, **as a matter of law**, advance a cause of action under Title VII for harassment by male co-workers. Further, the District Court observed that defendants Pippen and Johnson could not be considered Oncale's "employers" under Title VII. A timely appeal followed.

On May 20, 1996 the Fifth Circuit affirmed the trial court's summary judgment determination, holding that same-sex sexual harassment is not cognizable under Title VII. In response, Joseph Oncale requested rehearing and reconsideration of the matter *en banc*. This effort to obtain reconsideration of the Fifth Circuit's position that, as a matter of law, same-sex sexual harassment claims are not viable under Title VII, failed and this petition followed.

B. Background Facts

Mr. Oncale's claim arises out of a series of events that occurred during his employment as a roustabout assigned to an off-shore drilling location with Sundowner Offshore Services between August and November of 1991.[1] Joseph Oncale was denied his civil and employment rights in violation of law as over a number of weeks

[1] Oncale was hired through Sundowner's Houma Louisiana office and worked "seven on, seven off" on Chevron USA's Ship Shoal 266-A platform. During his shift, Mr. Oncale worked on Platform A and stayed in the crew's quarters located

he was sexually assaulted, battered, touched, and threatened with homosexual rape by his direct supervisor, John Lyons, and a second supervisor, Danny Pippen, who, as a driller for Sundowner, exercised *de facto* control over the terms and conditions of Oncale's employment. The third individual defendant, Brandon Johnson, a co-worker with no apparent supervisory authority, assisted John Lyons in one of the attacks.[2]

Mr. Oncale, who suffered several direct, sexual assaults and innumerable threats of continuing sexual

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on Platform B. At all relevant times Oncale's crew consisted of John Lyons, crane operator, Danny Pippen, driller, Brandon Johnson, roughneck, a derrick hand and two other roustabouts.

[2] The facts testified to by Joseph Oncale, which must be accepted as true for purposes of Sundowner's summary Judgment motion and this appeal, are that on October 25, 1991 Danny Pippen grabbed and held Oncale as the crew was being transported by boat from Platform A to Platform B. John Lyons then removed his penis from his pants and placed it on the back of Oncale's head. As Oncale struggled to free himself Lyons said he was going to "fuck (Oncale) in the behind." The sexual harassment continued.

The next morning, as the crew was being lifted unto Platform A in a personnel basket Brandon Johnson grabbed and restrained Oncale to facilitate another sexual assault by Lyons. During this attack Lyons again removed his penis from his pants, this time placing it on Oncale's arm and again assuring Oncale that he would have to submit to these sexual advances.

The sexual assaults continued as the crew returned to their quarters on October 26, 1991. As Oncale was taking a shower, Pippens and Lyons got into the shower stall with Oncale. Pippens pinned Oncale as Lyons inserted a bar of soap into "the cheeks of his (Oncale's) behind." As they held Oncale both men, Pippens and Lyons, assured Oncale that they were going to "fuck (Oncale) in the behind."

abuse and who twice reported the situation to his employer's highest ranking representative on the job site, to no avail, was forced to quit his employment as he feared that were he to stay he "would be raped or forced to have sex."[3] The facts of the vulgar and violent actions of the individual defendants and the circumstances under which Joseph Oncale reported the sexual harassment to his toolpusher and safety director were fully submitted to the Trial Court in response to the summary judgment motion. The summary judgment record also includes the admission by Brandon Johnson that he restrained Joseph Oncale while John Lyons said he was going to put his dick on Oncale.

The background facts, thus, are that Oncale's immediate supervisor, John Lyons, and another supervisor, Danny Pippen, who had *de facto* control over the conditions of his employment, physically restrained him on two occasion while John Lyons placed his penis on Mr. Oncale's arm. The supervisors further violated Oncale sexually on a third occasion when John Lyons attacked Mr. Oncale in the showers and forced a bar of soap into Mr. Oncale's anus while Danny Pippen held Mr. Oncale. The supervisors attacked Joseph Oncale both in the designated work areas of the rig while Mr. Oncale was on duty and in the showers/living quarters, repeatedly assuring Oncale that they desired and intended sexual intercourse and that they would continue with their assaults as long as Mr. Oncale remained employed on the Sundowner rig.

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[3] After each of the sexual attacks Oncale reported the events to Valent Hohen, Jr., Safety Compliance Clerk for Sundowner. Hohen refused to take any action.

The Safety Director and Toolpusher, the highest ranking employees of Sundowner on the rig were fully informed of the sexual assaults and harassment but did nothing to halt the repeated sexual threats and sexual battery. Instead, Mr. Lyons assured Joseph Oncale that his reporting of the sexual harassment would not bring an end to the ordeal, forcing Oncale to quit his employment. On November 10, 1991 Sundowner's Safety Compliance Officer signed a Separation Notice which identifies the reason for leaving as: "Voluntary Leaving due to sexual harassment and verbal abuse."

Joseph Oncale was not a lone or isolated victim of the sexual assaults committed by John Lyons. If this matter is allowed to proceed to trial Oncale's evidence will include the testimony of other victims of John Lyons and, further, Mr. Johnson's description of how, several weeks prior to the assaults on Joseph Oncale, John Lyons, again with the assistance of the other individual defendants, held down a worker by the name of Kent Brumfield and "sucked a hickey on his neck."

The deposition testimony of Danny Pippen is that the actions complained of by Joseph Oncale did occur and did not constitute "horseplay" within the community of offshore laborers. Further, Danny Pippen admits that as a driller he had authority to direct and terminate Mr. Oncale's employment.

REASONS FOR GRANTING THE PETITION

Discrimination "because of sex," as it has evolved through the administrative process and adoption of the

"reasonable person" standard, is more than gender-driven denial of specific employment opportunities. It is, and includes, conduct of an employer or supervisory personnel for which the employer is responsible which implicitly or explicitly communicates that an individual's right to continued employment is conditioned upon submission to unwelcomed sexual advances. When an individual of either gender reasonably perceives that he must abandon his employment to escape unsolicited sexual harassment and verbal and physical sexual assault, he is the victim of employment discrimination based on sex as proscribed by Title VII. Lyons', Johnson's and Pippen's act of selecting Joseph Oncale to be the victim of their unsolicited sexual harassment and assaults was an act of discrimination "because of sex" as Joseph Oncale, alone among the males in the work place, was forced to tolerate his direct supervisors' deviant approaches as a condition of his employment. As a matter of law and fact Oncale has advanced a viable hostile environment and quid pro quo sexual discrimination claim. To the extent the decision below and the Fifth Circuit's decision in *Garcia v. Elf Atochem North America, supra*, act as a bar to this Title VII action they are inconsistent with the language, scope and purpose of applicable law as defined by the United States Supreme Court and must be set aside. This Court should grant Joseph Oncale's petition, overturn the Fifth Circuit's absolute rejection of "same sex" actions under Title VII and allow Joseph Oncale to proceed with his claims.

1. The Fifth Circuit's flat declaration that same sex harassment is never actionable under Title VII has been questioned by other Courts of Appeals. A conflict of interpretation exists among the Circuits.

The Fifth Circuit's flat pronouncement that same-sex sexual harassment is not cognizable under Title VII has divided the courts and commentators of this land.[4] Other Circuits have indicated that same-sex claims should not be excluded from the scope of Title VII and the bar of discrimination based upon sex. See, for example, *Baskerville v. Culligan International Company*, 50 F.3d 428, 430 (7th Cir. 1995) (In a heterosexual harassment action, the Court noted parenthetically that "sexual harassment of women by men is the most common kind, but we do not need to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not be actionable in appropriate cases.") Similarly, *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 148 (2nd Cir. 1993) (Judge Van Graafeiland concurring) ("harassment is harassment regardless of whether it is caused by a member of the same or opposite sex.") *Cert. denied*, ___ U.S. ___, 114 S.Ct. 1189, 127 L.Ed.2d 539 (1994). The District of Columbia Circuit has also acknowledged

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[4] See, *Oncale v. Sundowner*, 83 F.2d 118 at notes 2 & 3 for citation to numerous district court decisions in which the *Garcia* approach was rejected. Consider further that computer generated research dated September 20, 1996 revealed more than 143 reported cases involving discussion of the Fifth Circuit's approach to "same sex" harassment disputes. One can state with accuracy that "male-male" harassment claims have triggered a variety of responses by, and disagreement among, the Federal Courts of this country.

the possibility of actionable sexual harassment under Title VII where "a subordinate of either gender" is harassed "by a homosexual superior of the same gender." See *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).

In *Hopkins v. Baltimore Gas and Electric Company*, 77 F.3d 745 (4th Cir. 1996) the Fourth Circuit considered Title VII claims brought by a male who complained that his male supervisor's comments and actions created a sexually hostile work environment in violation of Title VII of the Civil Rights Act of 1964. The trial court, with reference to the Fifth Circuit's *Garcia* decision, granted summary judgment for the employer, reasoning that an employee cannot state a Title VII claim of sexual harassment by a supervisor or co-worker of the same gender, *Hopkins v. Baltimore Gas and Electric* Company, 871 F. Supp. 822 (D. Md. 1994). A divided Fourth Circuit affirmed the trial court as a matter of fact, finding Mr. Hopkins had failed to make out a prima facie case, but through the lead opinion refused to embrace *Garcia* and the precept that same-gender harassment is never actionable under Title VII. *Hopkins*, 77 F.3d 750-753.

The uncertainties and divisions developing in the "same sex" Title VII arena are reflected plainly through the conflict among panels of the Court of Appeals for the Fourth Circuit. The lead opinion in *Hopkins* is inconsistent with another ruling out of the Fourth Circuit. In *M-Williams v. Fairfax County Board of Supervisors*, 72 F.3d 1191, 1195-96 (4th Cir. 1996) a panel of the Fourth Circuit held that harassment among heterosexuals of the same sex could not, as a matter of law, give rise to a hostile environment sexual harassment claim under Title VII.

While the Fourth Circuit has split on the same sex harassment question, the Eighth Circuit has rejected the Fifth Circuit's approach.

In *Quick v. Donaldson Company, Inc.*, 1996 WL 420381 (8th Cir.) (Iowa) (July 29, 1996), the United States Court of Appeals for the Eighth Circuit considered a hostile environment sexual harassment claim based upon allegations the plaintiff, a male, was physically and verbally harassed by male co-workers and that his employer, Donaldson Company, Inc., knew of the harassment but failed to respond with proper remedial action. As in this case, the trial court granted summary judgment to the employer. The Eighth Circuit, reviewing the facts and finding genuine factual disputes precluded summary dismissal, reversed and remanded.

The important background facts were that Phil Quick, a male, was employed as a welder and press operator in his employer's muffler production facility. About 85% of the plant employees were male. Quick claimed he was the work-place victim of "bagging," (defined as the intentional grabbing and squeezing of another man's groin), as well as other physical assaults and verbal harassment. Like Joseph Oncale, Quick demonstrated that his complaints of sexual harassment were ignored by supervisory personnel. As the sexual harassment grew intolerable and obtaining no relief through complaints to his employer, Quick filed a charge of discrimination with the Iowa Civil Rights Commission. Eventually, he amended his complaint to add counts of sexual discrimination in violation of Title VII, 42 U.S.C. Section 2000e-2(a)(1).

Recognizing Quick's right to proceed under Title VII, the Eighth Circuit traced the interpretation and application of Title VII through *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) and *Harris v. Forklift Systems, Inc.*, ___ U.S. ___, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). With reference to this authority the Eighth Circuit reasoned protection under Title VII is not limited to women but, instead, extends to all employees and prohibits disparate treatment of an individual, man or woman, based on that person's sex. There was no requirement, the Eighth Circuit continued, that Quick advance evidence of an "anti-male" or predominantly female work environment. Evidence that Quick, a male, was the primary target of sexual harassment was sufficient to show that the conduct was gender-based for purposes of summary judgment.

The Eighth Circuit quickly noted that four of the five elements of a "traditional" hostile environment claim were present: (1) Quick belonged to a protected group – he was male; (2) he was subject to unwelcomed sexual harassment; (3) harassment affected a term, condition, or privilege of employment; and (4) Quick's employer knew or should have known of the harassment and failed to take proper remedial action. Focusing on the fifth requirement, that the harassment be "based on sex," the Court found genuine issues of material fact existed, precluding summary judgment. The District Court noted the conduct was of a "genuine sexual nature" and, thus, could constitute sexual harassment. Further, the Eighth Circuit reasoned, the motive underlying the conduct, be it hooliganism or hatred, could not remove the defendants from the scope of Title VII. Whether the defendants'

actions constituted prohibited sexual harassment was a question to be tried.

In short, there are two conflicting judicial interpretations regarding same-gender sexual harassment. One interpretation is that, by its nature and as a matter of law, same-gender sexual harassment is not "based on sex" and is not actionable under Title VII. See, *Garcia v. Elf Atochem*, 28 F.3d 446, 451 (5th Cir. 1994); *Hopkins v. Baltimore Gas & Electric Co.*, 871 F. Supp. 822, 834-35 (D. Md. 1994), *aff'd*, 77 F.3d 745 (4th Cir. Mar. 5, 1996). See, *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988).

The other interpretation, however, looks at the facts of each of harassment situation to determine whether the same-gender sexual harassment was based on sex. See, *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D. Wyo. 1993); *Joyner v. AAA Copper Transp.*, 597 F. Supp. 537 (N.D. Ala. 1983), *aff'd without opinion*, 749 F.2d 732 (11th Cir. 1984); *Wright v. Methodist Youth Services, Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981). If the harasser was a homosexual, or acted homosexually, then the harassment of the heterosexual victim was based on sex and is actionable under Title VII.

As Judge Nagle noted in his dissent in *Quick v. Donaldson Company, Inc.*, 71 Fair Empl. Prac. Cas. (BNA) 551, 1996 WL 420381 (8th Cir.) (Iowa) July 29, 1996, the fundamental difference between the two schools of thought lies in the question who should decide whether a cause of action exists under Title VII given a "male-on-male" or "same sex" fact pattern. The *Garcia/Oncale* Fifth Circuit approach is to characterize the question as one of statutory interpretation with the Court having answering

the question in the negative: Title VII does not, as a matter of law, protect an employee from sexual harassment by a supervisor of the same gender. The other approach, adopted by the United States Court of Appeals for the Eighth Circuit in *Quick v. Donaldson Company, Inc., supra*, and suggested by the Seventh Circuit in *Baskerville* and the Second Circuit in *Saulpaugh* is to acknowledge the question as one of fact, allowing the fact finder, be it judge or jury, to decide the case through application of factors developed through decision of "traditional" hostile work environment and quid pro quo sexual harassment cases. It appears, therefore, that had Joseph Oncale, like Mr. Quick, brought his action in the Eighth Circuit or in the Second or Seventh Circuits his Title VII claims would have survived summary judgment review.

This Court should grant certiorari to address and resolve the uncertainty and inconsistency reflected in the lower courts' decision of "same sex" Title VII actions.

2. The Fifth Circuit's Categorical Rejection of "Same Sex" Harassment Claims Is Inconsistent With the Language, Intent and Scope of Title VII as Defined by This Court.

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals . . . sex." 42 U.S.C. Section 2000e-2(a)(1). The statute proscribes various forms of sexual harassment in the workplace, including both hostile or abusive environment claims as well as cases in which sexual misconduct is directly linked to the

grant or denial of an economic quid pro quo. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).

In *Meritor Savings Bank v. Vinson*, this Court recognized for the first time that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive working environment." Following the lead of several Circuit Courts of Appeals, the Supreme Court further held that "unwelcome sexual advances that create an offensive or hostile working environment" may form the basis of a claim of sex discrimination under Title VII. *Meritor Savings Bank, supra* at 64; accord *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981). For sexual harassment to be actionable, the Court reasoned it "must be sufficiently severe or pervasive to alter the conditions of (the victims) employment and create a hostile or abusive work environment." *Vinson*, 477 U.S. at 67. *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1992).

While *Vinson* did not address "same sex" or "male-on-male" harassment, nothing in the Court's analysis of remedies suggests that Title VII is limited to heterosexual harassment. To the contrary, as this Court's definition of Title VII's scope is cast in gender neutral terms it appears the proper focus is the nature and severity of the sexual harassment and not the gender of the harasser and victim.[5] See, generally, *Sardinia v. Dellwood Foods, Inc.*, 1995 WL 640502 (S.D.N.Y. 1995).

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[5] "No matter what the gender of the harasser or victim, the 'gravamen of any sexual harassment claim is that the alleged

The language of Title VII provides no support for the Fifth Circuit's absolute rejection of Title VII same sex claims. Congress chose to use the unmodified word "sex" when referring to discrimination that is forbidden. This is a choice of an obviously gender neutral term, just as Congress chose to prohibit discrimination based on "race" rather than discrimination against African Americans or other specific minorities. Had Congress intended to prevent only heterosexual sexual harassment, it could have used the term "member of the opposite sex." Accordingly, the plain language of 42 U.S.C. Section 2000e-2 does not limit Title VII to heterosexual harassment and provides no statutory foundation for the Fifth Circuit's flat pronouncement that same sex harassment is never actionable under Title VII. As many courts have recognized, the language and purpose of Title VII is broad enough to include homosexual harassment claims. Sexual harassment of a subordinate by a supervisor of the same sex is an adverse employment action that the subordinate would not have faced but for his or her sex. See, for example, *Joyner v. AAA Copper Transportation*, 597 F. Supp. 357; *Wright v. Methodist Youth Services, Inc.*, 511 F. Supp. 307, 310 (N.D. Ill. 1981).

The plain meaning of the phrase in Title VII prohibiting discrimination based upon sex implies that it is unlawful to discriminate against women because they are women and men because they are men. When a supervisor makes offensive, homosexual sexual advances to a

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sexual advances were 'unwelcomed' ". *Meritor*, 47 U.S. at 68, citing 29 C.F.R. Section 1604.11(a) *Sardinia v. Dellwood Foods, Inc., supra.*

subordinate of the same sex, that supervisor communicates to the subordinate that submission to sexual advances has then become a pre-requisite or term or condition of continued employment. That supervisor is communicating to his subordinate that the subordinate must tolerate sexual assault, sexual battery and homosexual rape as a condition of his choice to exercise his right to continued employment. This is same sexual harassment and is actionable under Title VII.

While virtually no legislative history is available to guide the interpretation and application of Title VII's prohibition against discrimination based on sex[6] and Congress provided no hint in the statute as to what it meant by the term "sex" and did not address the issue of sexual harassment, the Fifth Circuit was not writing on a blank page in the *Garcia* and *Oncale* cases. Indeed, the scope of protection against discrimination on the basis of sex has been thoroughly considered and commented upon by the Equal Employment Opportunity Commission. The Fifth Circuit either ignores or rejects the EEOC's guidelines, one cannot determine which, when it declares

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[6] Opponents of Title VII added the proscription against sex discrimination when it was on the floor of the House of Representatives as a last minute attempt to prevent Title VII from passing. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-64 (1986). ("The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. The principal argument in opposition to the amendment was that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment.")

same sex sexual harassment is not cognizable under Title VII.

In 1980 the Equal Employment Opportunity Commission issued guidelines which define sexual harassment as discrimination based on sex within the meaning of Title VII. See, 29 C.F.R. Section 1604.11(a) (1993). More specifically, the EEOC defines sexual harassment as follows:

> "Unwelcomed sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individuals, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."

As evidenced through this Court's opinions in *Meritor Savings Bank v. Vinson, supra*, and *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42, 97 S.Ct. 401, 410 (1976), the guidelines issued by the EEOC, while not controlling do, by reason of their authority, constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance. Considering Joseph Oncale's claims in light of the EEOC's interpretive guidelines it is apparent he has stated a viable Title VII claim as submission to unwelcomed sexual advances became a condition for his continued employment with

Sundowner Offshore. The actions of his supervisors certainly created a sexually intimidating and offensive work environment in violation of law.[7]

In short summary, an interpretation of Title VII which permits same sex harassment claims is certainly required by this Court's embrace of the EEOC guidelines and its statement in *Meritor v. Vinson*, 477 U.S. at 64, 106 S.Ct. at 2404 (1986) that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex." The Fifth Circuit's flat rejection of Joseph Oncale's "same sex" Title VII action, founded as it is upon one District Court's unreasoned and unsupported assertion that male-on-male sexual harassment "was not the type of conduct Congress intended to sanction when it enacted Title VII," *Goluszek*, 697 F. Supp. at 1456, cannot be reconciled with the *Meritor* Court's approach to sexual harassment claims under Title VII.

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[7] The EEOC Guidelines on Discrimination Because of Sex – Sexual Harassment, 29 C.F.R. § 1604.11(a) (1993), clearly state, "[h]arassment on the basis of sex is a violation of Section 703 of Title VII." Moreover, following from the principle that Title VII prohibits sex discrimination against both genders, it is well settled that both men and women can be sexual harassers as well as victims of sexual harassment. See EEOC Compl. Man. (CCH) § 615.2(b)(1) (1981) (instructing that "[a] man as well as a woman may be the victim of sexual harassment," and that "a woman as well as a man may be the harasser"). See also EEOC Decision No. 81-16, Empl. Prac. Dec. (CCH) (1981) ¶ 6756 at 4796-97 (allegation that male supervisor "made unwanted sexual advances" toward male subordinate states "a violation of Title VII" if substantiated).

Next, the *Garcia/Oncale* approach to interpretation of Title VII and definition of discrimination "based on sex" is inconsistent with the gender-neutral approach embraced within the Eleventh Circuit's decision in *Henson v. Dundee*, 682 F.2d 897, 902 (1992) and cited approvingly in both the lead opinion in *Meritor* and Justice Scalia's concurring opinion in *Harris v. Forklift Systems, Inc.*, ___ U.S. ___, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

Specifically, the High Court in *Meritor*, 477 U.S. at 66-67, 106 S.Ct. at 2405 (1986) cited with approval the Eleventh Circuit's statement in *Henson v. Dundee*, 682 F.2d 897, 902 (1992):

> "Surely, a requirement that **a man or a woman** run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." (Emphasis added)

Thus the language, scope and purpose of Title VII, it would appear, require the conclusion that men, as well as women, can be victims of discrimination based on sex proscribed under Title VII and the "gauntlet of sexual abuse" which a worker need not tolerate as a condition of employment includes homosexual sexual abuse.

Neither a man nor a woman can be required, as Joseph Oncale was required, to run a gauntlet of sexual abuse, as a condition of employment. To subject an individual to a sexually offensive and degrading environment as the price of walking in the door to go to work is to discriminate against that individual on the basis of sex. To require Joseph Oncale to endure the onslaught of sexually charged words and actions as a condition of his

employment with Sundowner is to subject him to harassment based on sex.

That the "evil" addressed through Title VII is more than gender-based denial of specific economic opportunities for women, as the Fifth Circuit declares through its embrace of *Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988) and its summary dismissal of Joseph Oncale's claims is reflected plainly in the broad discussion of the parameters of sexual discrimination engaged in by this Court in *Harris v. Forklift Systems, Inc.*, ___ U.S. ___, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

In *Harris* this Court was called upon to define a discriminatorily "abusive work environment." Its approach to this matter is instructive for present purposes as this Court plainly defined the scope of Title VII of the Civil Rights Act of 1964 in gender-neutral terms. As the Court stated in its explanation of an actionable hostile work environment claim, "Title VII bars conduct that would seriously affect *a reasonable person's* psychological well-being." *Harris*, 114 S.Ct. at 370-371, 126 L.Ed.2d at 302 (1993) (emphasis added). Where the environment would be reasonably perceived, and is perceived, as hostile or abusive, the "individual," "reasonable person" or "victim", be he male or female, is entitled to pursue the remedies afforded through Title VII. *Harris, supra.*

The Eleventh Circuit's approach to sexual discrimination claims and, particularly, its decision in *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) was again noted by this Court. See, *Harris*, 114 S.Ct. at 370, 126 L.Ed.2d 295, 301 (1993).

In *Ellison*, 924 F.2d 878, 879 (9th Cir. 1991) the court reviewed a hostile environment sexual harassment action brought by a female employee of the Internal Revenue Service and held:

> " . . . a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."

Then, in an important footnote which foreshadowed the "reasonable person" standard adopted in *Harris*, the Eleventh Circuit stated:

> "Of course, where male employees allege that co-workers engage in conduct which creates a hostile environment, the appropriate victim's perspective would be that of a reasonable man." *Ellison*, 924 F.2d at 879, n.11.

Given this language and the United States Supreme Court's adoption of a "reasonable person" approach to analysis of sexual harassment claims, it must be determined that Joseph Oncale, having advanced allegations of sexual harassment – defined by the EEOC as "unwelcomed sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature See, 29 C.F.R. Section 1604.11(a) (1995) – which the reasonable man could consider sufficiently severe to alter the conditions of his employment and create an abusive work environment, is entitled to proceed. Title VII addresses more than the denial of specific economic opportunities, there is no textual or historical support for the Fifth Circuit's interpretation of the statute and men

are "individuals" under the law entitled to the protections afforded through Title VII.

Lastly, there is no logical foundation for the Fifth Circuit's absolute rejection of same sex Title VII claims. No Court has ever explicitly interpreted Title VII as requiring a plaintiff to prove that the person doing the discrimination is not of the same gender. Furthermore, application of the Fifth Circuit's rule would be illogical because it is obvious that sexual harassment by a supervisor of the same sex is exaction of a condition of employment which, but for his or her sex, an employee would not have faced.

The absurd circumstances which continued application of the *Oncale* rule would create are underscored by the U.S. District Court for the Eastern District of Louisiana in the matter of *Pritchett v. Sizeler Real Estate Management Company*, No. Civ. A. 93-2351, 1995 WL 241855 (E.D. La. April 25, 1995). In *Pritchett*, the plaintiff filed an action against her former employer alleging that she was sexually harassed by her female supervisor in violation of Title VII. Dismissing the defense motion for summary judgment, the Court reasoned it seemed discriminatory that a supervisor should be exempted from a Title VII sexual harassment claim solely because of that supervisor's sexual origination or the gender of his victim. As the Court in *Pritchett* put it, "to conclude that same-gender harassment is not actionable under Title VII is to exempt homosexuals from the very laws governing the work place conduct of heterosexuals." *Pritchett v. Sizeler Real Estate Management Company*, No. Civ. A. 93-2351, 1995 WL 241855 (E.D. La. April 25, 1995). In effect, the Fifth Circuit's rejection of same-sex Title VII claims gives

homosexual harassers, or harassers who chose to act homosexually, license to harass. Certainly, the clear language, broad scope and defined purpose of Title VII, as articulated by this Court, are violated by the Fifth Circuit's chosen interpretation.

CONCLUSION

Congress prohibited discrimination based upon sex. This means that if a person receives discriminatory treatment from a company or a supervisor because of the employee's sex, Title VII has been violated. When a male supervisor propositions or harasses a male subordinate and conditions the subordinate's continued employment upon submission to the sexual whim of the supervisor the subordinate has been discriminated against "based on sex." The Court should hold that the violent and vulgar sexual harassment endured by Joseph Oncale is actionable under Title VII. John Lyons, Danny Pippen and Brandon Johnson, with the acquiescence of their superiors, required sexual favors and submission to sexual assault as a precondition to Mr. Oncale's continued employment. The treatment Joseph Oncale received certainly constitutes sexual discrimination as defined by the EEOC and this Court.

For the reasons stated, the Court should grant the petition for writ of certiorari.

Respectfully submitted

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APPENDIX A

Joseph ONCALE, Plaintiff-Appellant,

v.

SUNDOWNER OFFSHORE SERVICES, INC., John Lyons, Danny Pippen, and Brandon Johnson, Defendants-Appellees.

No. 95-30510.

United States Court of Appeals,
Fifth Circuit.

May 20, 1996.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before SMITH, DUHÉ, and DeMOSS, Circuit Judges.

DUHÉ, Circuit Judge:

Appellant Joseph Oncale filed this suit against Sundowner Offshore Services, Inc., ("Sundowner"), John Lyons, Danny Pippen and Brandon Johnson, alleging that he had been sexually harassed during his employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). The district court granted summary judgment in favor of the defendants and dismissed Oncale's case. Because our decision in *Garcia v. Elf Atochem No. Am.*, 28 F.3d 446, 451-52 (5th Cir.1994), holds that same-sex harassment is not cognizable under Title VII, we affirm.

BACKGROUND

Joseph Oncale was employed by Sundowner on an offshore rig from August to November 1991. Oncale filed this Title VII action against Sundowner, John Lyons, his Sundowner supervisor, and Danny Pippen and Brandon Johnson, two Sundowner co-workers, alleging sexual harassment. Oncale alleges that the harassment included Pippen and Johnson restraining him while Lyons placed his penis on Oncale's neck, on one occasion, and on Oncale's arm, on another occasion; threats of homosexual rape by Lyons and Pippen; and the use of force by Lyons to push a bar of soap into Oncale's anus while Pippen restrained Oncale as he was showering on Sundowner premises. Oncale alleges both *quid pro quo* and hostile work environment sexual harassment.[1] Oncale quit his job at Sundowner soon after the shower incident.

The district court granted summary judgment on Oncale's Title VII claim, relying upon our statement in *Garcia v. Elf Atochem No. Am.*, 28 F.3d 446, 451-52 (5th Cir.1994), that harassment by a male supervisor against a male subordinate does not state a claim under Title VII. Thus, the court concluded that it was "compelled to find that Mr. Oncale, a male, has no cause of action under Title

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[1] Sexual harassment in the workplace violates Title VII if it constitutes *quid pro quo* harassment, i.e., a supervisor conditions job benefits either explicitly or implicitly on an employees participation in sexual activity, *see Jones v. Flagship Int'l*, 793 F.2d 714, 721-22 (5th Cir.1986), *cert. denied*, 479 U.S. 1065, 107 S.Ct. 952, 93 L.Ed.2d 1001 (1987), or if it alters an employee's working conditions by creating a hostile work environment because of the employee's sex. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, ___, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993).

VII for harassment by male co-workers." Finally, the court found that Oncale's co-workers, Pippen and Johnson, could not be held liable as "employers" under Title VII.

DISCUSSION

Precedential Value of Garcia

Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's . . . sex. . . ." 42 U.S.C. § 2000e-2(a)(1). Appellant and the Equal Employment Opportunity Commission (as *Amicus Curiae*) argue that Title VII's prohibition against sex discrimination and the Supreme Court's sexual harassment decisions are formulated in gender-neutral terms, and therefore, prohibit all discrimination *because of sex*, whether it is discrimination against men or women. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, ___, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993) (referring to "victims" of sexual harassment, and not just female victims, and adopting "reasonable person" standard for measuring offensiveness of work environment); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986) (" 'Surely a requirement that a *man or woman* run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.' ") (emphasis added) (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir.1992)). Under this reading of the statute, so long as the plaintiff proves that

the harassment is because of the victim's sex, the sex of the harasser and victim is irrelevant.

This panel, however, cannot review the merits of Appellant's Title VII argument on a clean slate. We are bound by our decision in *Garcia v. Elf Atochem No. Am.*, 28 F.3d 446, 451-52 (5th Cir.1994), and must therefore affirm the district court. Although our analysis in *Garcia* has been rejected by various district courts,[2] we cannot overrule a prior panel's decision. In this Circuit, one panel may not overrule the decision, right or wrong, of a prior panel in the absence of an intervening contrary or superseding decision by the Court *en banc* or the Supreme Court. *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir.1991).

This Circuit's same-sex Title VII jurisprudence began with *Giddens v. Shell Oil Co.*, 12 F.3d 208 (5th Cir.1993) (per curiam) (unpublished), *cert. denied*, ___ U.S. ___, 115 S.Ct. 311, 130 L.Ed.2d 274 (1994). Although the holding in that case is not entirely clear, it appears that the Court

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[2] These cases include *Williams v. District of Columbia*, 916 F.Supp. 1, 8 (D.D.C.1996); *Sardinia v. Dellwood Foods, Inc.*, 1995 WL 640502, at *4-5 (S.D.N.Y. Nov. 1, 1995); *King v. M.R. Brown, Inc.*, 911 F.Supp. 161, 167 (E.D.Pa.1995); *Ecklund v. Fuisz Technology, Ltd.*, 905 F.Supp. 335, 338 (E.D.Va.1995); *Raney v. District of Columbia*, 892 F.Supp. 283, 286 (D.D.C.1995); *Griffith v. Keystone Steel & Wire*, 887 F.Supp. 1133, 1136 (C.D.Ill.1995); *E.E.O.C. v. Walden Book Co., Inc.*, 885 F.Supp. 1100, 1101 (M.D.Tenn.1995); *Roe v. K-Mart Corp.*, 1995 WL 316783, at *1 (D.S.C. March 28, 1995); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F.Supp. 1545, 1550 (M.D.Ala.1995); *McCoy v. Johnson Controls World Services, Inc.*, 878 F.Supp. 229, 231 (S.D.Ga.1995).

ruled that male-on-male harassment with sexual overtones is not sex discrimination without a showing that an employer treated the plaintiff differently because of his sex. Next, in *Garcia*, we extended *Giddens* to bar all same-sex sexual harassment claims:

> Finally, we held in *Giddens v. Shell Oil Co.*, No. 92-8533 [12 F.3d 208] (5th Cir. Dec. 6, 1993) (unpublished), that '[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination.' *Accord Goluszek v. Smith*, 697 F.Supp. 1452, 1456 (N.D.Ill.1988). Thus, what Locke did to Garcia could not in any event constitute sexual harassment within the purview of Title VII, and hence summary judgment in favor of all defendants was proper on this basis also.

This discussion seems to indicate clearly that same-sex harassment claims are not viable under Title VII. When read in its proper context, however, this final paragraph of the *Garcia* opinion poses an interpretive problem. Because the Court had already found an independent basis to affirm the grant of summary judgment to each defendant, no part of this analysis is necessary to support the ultimate decision. Thus, the question arises whether we should treat *Garcia's* pronouncement on same-sex sexual harassment as binding precedent or dictum. When faced with this issue, some district courts in this Circuit (like the trial court here) have applied *Garcia* to dismiss same-sex harassment claims. *See Sarff v. Continental Express*, 894 F.Supp. 1076, 1082 (S.D.Tex.1995); *Myers v. City of El Paso*, 874 F.Supp. 1546, 1548

(W.D.Tex.1995). Others, by contrast, have ruled that *Garcia's* statements about same-sex harassment are dicta. *See Pritchett v. Sizeler Real Estate Mgmt. Co.*, 1995 WL 241855, at *2 (E.D.La. April 25, 1995); *Castellano v. Whole Foods Market, Inc.*, No. H-94-2673, slip op. at 7-8 (S.D.Tex. October 26, 1995).

We read *Garcia's* analysis of sexual harassment as binding precedent. After stating that Title VII does not recognize male-on-male claims, the Court explicitly stated that summary judgment "was proper on this basis also." This language suggests that the same-sex rationale for rejecting Garcia's claim is an alternative holding, which we treat as *stare decisis* in this Circuit. "It has long been settled that all alternative rationales for a given result have precedential value. 'It does not make a reason given for a conclusion *obiter dictum*, because it is the only one of two reasons for the same conclusion.' " *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 925 n. 21 (5th Cir.1977) (quoting *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340, 48 S.Ct. 194, 196, 72 L.Ed. 303 (1928)). Moreover, another panel of this Court has recognized *Garcia* as binding precedent on the issue of same-sex harassment, thereby resolving any uncertainty about *Garcia's* precedential force. *See Blake v. City of Laredo*, 58 F.3d 637 (5th Cir.1995) (per curiam) (unpublished). Therefore, *Garcia* remains the law of this Circuit.[3]

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[3] Although no circuit split yet exists, other circuits have indicated that same-sex claims should not be excluded from Title VII's purview. *See, e.g., Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir.1995) (In a heterosexual harassment action, the court noted parenthetically that "[s]exual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not be actionable in appropriate cases."). Similarly, in concurring with the Second Circuit's decision in *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1189, 127 L.Ed.2d 539 (1994), Judge Van Graafeiland observed, "harassment is harassment regardless of whether it is caused by a member of the same or opposite sex." The District of Columbia Circuit has also acknowledged the possibility of actionable sexual harassment under Title VII where "a subordinate of either gender" is harassed "by a homosexual superior of the same gender." *Barnes v. Costle*, 561 F.2d 983, 990 n. 55 (D.C.Cir.1977).

The Fourth Circuit, by contrast, recently held that harassment among *heterosexuals* of the same sex cannot give rise to a hostile environment sexual harassment claim under Title VII. *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191, 1195-96 (4th Cir.1996). *McWilliams*, however, explicitly does not "purport to reach any form of same-sex discrimination claim where either victim or oppressor, or both, are homosexual or bisexual." *Id.* at 1195 n. 4. In a later decision, the Fourth Circuit in dicta expressed its disagreement with the reasoning of *Garcia*. *Hopkins v. Baltimore Gas & Electric Co.*, 77 F.3d 745, 751 (4th Cir.1996).

CONCLUSION

For the foregoing reasons, the decision of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-30510

JOSEPH ONCALE,

Plaintiff-Appellant,

versus

SUNDOWNER OFFSHORE SERVICES INCORPORATED; JOHN LYONS; DANNY PIPPEN; BRANDON JOHNSON;

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 5/20/96, 5 Cir., ___, ___ F.3d ___)

(July 12, 1996)

Before SMITH, DUHÉ, AND DeMOSS, Circuit Judges.

PER CURIAM:

(✓) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor Judge in regular active service of the Court having requested

that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ John M. Duhé, Jr.
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE

VERSUS

SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, AND BRANDON JOHNSON

JUDGMENT

(Filed March 24, 1995)

The Court having granted the motion for summary judgment of defendants Sundowner Offshore Services, Inc., John Lyons, Danny Pippen, and Brandon Johnson;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants Sundowner Offshore Services, Inc., John Lyons, Danny Pippen, and Brandon Johnson, and against plaintiff, Joseph Oncale, dismissing plaintiff's claims with prejudice.

New Orleans, Louisiana this 23nd day of March, 1995.

/s/ G Thomas Porteous
G. Thomas Porteous, Jr.
United States District Judge

APPENDIX D

MINUTE ENTRY
PORTEOUS, J.
MARCH 23, 1995

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	CIVIL ACTION
VERSUS	NO. 94-1483
SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, AND BRANDON JOHNSON	SECTION "T" (Filed March 24, 1995)

Before the Court is Defendants' Motion for Summary Judgment. Plaintiff, Joseph Oncale, has filed opposition. This motion came before the Court for hearing on March 8, 1995.

Background

Plaintiff was employed as a roustabout by Sundowner Offshore Services, Inc. ("Sundowner") for several weeks in November of 1991. Plaintiff filed this suit for damages against Sundowner and three male individuals employed by Sundowner, John Lyons ("Lyons"), Danny Pippen ("Pippen") and Brandon Johnson ("Johnson"), alleging violations of the Civil Rights Act, Section 703(a)(1) of Title VII, and 42 U.S.C. 2000(e)-2(a)(1). Specifically, plaintiff seeks reinstatement to his former position or to a similar position, or in the alternative, damages resulting from the alleged sexual discrimination and

harassment he experienced while employed by Sundowner.

Standard for Summary Judgment

Under Fed. R. Civ. P. 56(c), summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The Fifth Circuit has explained that "[t]he Supreme Court has defined material facts as those that will affect the outcome of the lawsuit under governing law." *Meyers v. M/V Eugenio C.*, 919 F.2d 1070, 1072 (5th Cir. 1990), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Plaintiff's Complaint Does Not Give Rise to a Title VII Violation

Plaintiff's complaint alleges specific physical acts and verbal assaults perpetrated against plaintiff by Lyons, Pippen and Johnson. These acts and assaults, if proven, would constitute outrageous conduct by the defendants which would be actionable under Louisiana law.[1] However, plaintiff's complaint in this matter only alleges violations of Title VII, and the Fifth Circuit has clearly articulated its position that same sex harassment does not state a claim under Title VII. *See Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir. 1994).

The issue presented to the Fifth Circuit in *Garcia* was whether the district court erred in granting summary

[1] The Court is suggesting that plaintiff could have timely brought a state action.

judgment in favor of the defendants[2], dismissing Garcia's claim that he had been sexually harassed by a male coworker during his employment, in violation of Title VII. Affirming the grant of summary judgment, the Fifth Circuit explained that Garcia was limited to seeking equitable relief because the provisions of the Civil Rights Act of 1991 providing for damages were not retroactively effective as to his claim.[3] However, the Court continued its analysis, ruling that:

> Garcia's Title VII claim was also properly dismissed because he did not establish a prima facie case against any of the defendants.

Id. at 450. The Court explained that "Title VII prohibits an 'employer' from discriminating 'against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex.' " *Id.* Section 2000e(b) defines an employer as "a person engaged in an industry affecting commerce . . . and any agent of such a person. . . . In this Circuit, we have accorded the phrase 'any agent' a liberal construction. . . . ". *Id.* at 451. The "liberal construction" has been extended to include immediate supervisors who participate in the decision-making process that forms the basis

[2] Named as defendants in the *Garcia* suit were the parent company of Garcia's employer, the plant manager, and the plant foreman.

[3] Because no further incidents of harassment occurred after Garcia complained to his supervisors, and because Garcia continued in his employment with Seagraves Oazark, equitable relief was inappropriate, and damages were unavailable.

of the discrimination. However, "[t]here can be no liability under Title VII . . . 'for the actions of mere co-workers.' " *Id.* (citation omitted).

Although the *Garcia* court found an independent basis to affirm the grant of summary judgment as to each defendant, it concluded as follows:

> II. Sexual Harassment
>
> Finally, we held in *Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993) (unpublished), that "[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination." *Accord Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988). Thus, what Locke did to Garcia could not in any event constitute sexual harassment within the purview of Title VII, and hence summary judgment in favor of all defendants was proper on this basis also.

Id. at 451-52. Plaintiff argues that the above quoted language is dicta, however the Court disagrees. Although the *Garcia* court articulated other grounds to support its affirmance of summary judgment, it included the above quoted language and explicitly stated that summary judgment "was proper on this basis also." Following the clear directive of the Fifth Circuit in *Garcia*, this Court is compelled to find that Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers.

In addition, the Court finds that defendants Pippen and Johnson cannot be considered plaintiff's employer under Title VII, further supporting the Court's ruling granting summary judgment. *See* Affidavit of Edward M.

DuBroc, attached to defendant's motion for summary judgment.[4]

Accordingly, finding that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law, defendant's motion for summary judgment is hereby *granted*.

/s/ G Thomas Porteous
G Thomas Porteous, Jr.
United States District Judge

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[4] Mr. DuBroc, the personnel director for Sundowner Services, Inc., states in his affidavit that plaintiff's direct supervisor on the rig would have been Lyons. Pippen, a driller, was the direct supervisor of derrick hands and floor hands, not of roustabouts. Johnson was a floor hand, and his supervisor was Pippen.